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No. 80-382

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GENERAL PUBLIC UTILITIES CORPORATION, METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY AND PENNSYLVANIA ELECTRIC COMPANY,
Petitioners,

v.

SUSQUEHANNA VALLEY ALLIANCE, RONALD L. DAVIS, BETTY TOMPKINS, BEVERLY M. HESS, AND DOREEN E. SNELL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF SUSQUEHANNA VALLEY ALLIANCE, et al.

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BRIEF IN OPPOSITION OF SUSQUEHANNA VALLEY ALLIANCE, et al.

COUNTER-STATEMENT OF THE CASE

On March 28, 1979, the nation's most serious commercial nuclear accident began at Three Mile Island Nuclear Station, Unit 2 (hereinafter TMI), releasing in excess of 10 million curies of radionuclides

into the environment and contaminating 950,000 gallons of water on site.

In mid-April, 1979, without notice or any opportunity for public comment or review either in the form of an environmental impact statement (hereinafter EIS) or otherwise, the Nuclear Regulatory Commission (hereinafter NRC) approved a plan proposed by the Petitioner utilities to decontaminate the TMI reactor (Complaint, ¶37).

The first step in the process was to be the partial decontamination and subsequent discharge into the Susquehanna River of 245,000 gallons of intermediate-level radioactive water. The NRC verbally approved the purchase and construction by the utilities of a system known as EPICOR-II for decontamination of that water.

Faced with public announcements by Metropolitan Edison and the NRC that

imminent discharge of radioactive water into the Susquehanna River was scheduled, Respondents sent a 60-day notice of intent to sue under the Federal Water Pollution Control Act of 1977 (hereinafter the Clean Water Act), 33 U.S.C. §1365(b) on May 23, 1979, and on May 25, filed a Complaint and Motion for a Temporary Restraining Order.* Respondents alleged that operation of the decontamination system and discharge of treated water into the Susquehanna River would violate the Atomic Energy Act, 42 U.S.C. §2011 et. seq., and related regulations; §301(f) of the Clean Water Act, 33 U.S.C. §1311(f); and the U.S. Constitution; and that the authorization of such activities without an EIS violated the National Environmental Policy Act of 1969 (hereinafter NEPA), 42 U.S.C. §4321 et seq.

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*Very shortly before the case at bar was filed, the City of Lancaster, Pa. also filed suit, in District Court in the District of Columbia, to prohibit the same discharge.

On that same day, the NRC issued a statement (a) ordering preparation of an environmental assessment on use of EPICOR-II; (b) forbidding the licensee to operate EPICOR-II pending completion of the environmental assessment; (c) prohibiting discharge of wastewater into the Susquehanna River pending completion of a separate environmental assessment concerning such discharges; and (d) ordering a third environmental assessment on decontamination and disposal of "high-level" wastewater. Thus, although the NRC prohibited the discharge of wastewater into the river, it agreed only to undertake environmental assessments of alternatives for certain isolated portions of the clean-up. It refused to undertake a full EIS that would include alternatives for long-term disposal of highly radioactive resins produced by EPICOR-II, alternatives for

disposal of damaged core material and disposal of radioactive gases trapped in the containment building on site.

On August 20, 1979, the NRC issued for comment its assessment, Use of EPICOR-II at Three Mile Island, Unit 2, NUREG-0591, and confirmed its intention not to do a comprehensive EIS.

On October 12, 1979, Judge Rambo of the Middle District of Pennsylvania dismissed Respondents' complaint for lack of subject matter jurisdiction, for failure to exhaust administrative remedies. Respondents immediately appealed the dismissal to the Third Circuit Court of Appeals.

On October 16, 1979, four days after the District Court's dismissal, the NRC issued an order to proceed with operation

of EPICOR-II.* The Commission stated within the order that it was not an order subject to §189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a). Petitioners' Appendix (hereinafter Pet.App.), 55a-56a.

On October 18, 1979, the Third Circuit Court of Appeals refused Respondents' request that use of EPICOR-II be stayed pending appeal, after the NRC stated that storage space for untreated radioactive water being generated was almost exhausted and that no treated water would be discharged into the Susquehanna River.

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*Upon issuance of NRC's order to proceed with EPICOR-II, Respondents filed a Petition for Review, No. 79-2800, in the Third Circuit Court of Appeals, as a protective measure, pending the outcome in that court of the case at bar. Respondents' Motion to Hold Petition for Review in Abeyance Pending Disposition of Related Appeal was granted on February 14, 1980.

On November 9, 1979, four days before oral argument in the Third Circuit on Respondents' appeal, the NRC informed the Third Circuit of its intention to prepare a programmatic EIS on the decontamination and disposal of the radioactive wastes at TMI.

Though the NRC has moved forward on preparation of an EIS, clean-up operations have continued simultaneously; and Petitioner utilities are now in the process of constructing a system for decontamination of the remaining high-level radioactive water generated by the accident. They are also storing on Three Mile Island highly radioactive resins, produced from operation of EPICOR-II, because the ultimate disposal of such resins was not considered at the time approval for construction and operation were given, and because the NRC has not yet approved any plan for such disposal.

REASONS FOR DENYING THE WRIT

The Opinion Of The Court Of Appeals Does Not Interfere With The Nuclear Regulatory Commission's Regulatory Scheme And Does Not Conflict With The Decisions Of This Court And Other Courts Of Appeal

A. The Nuclear Regulatory Commission Is Not Seeking Certiorari

The Court of Appeals for the Third Circuit undertook in this case a careful analysis of the proper functioning of courts of appeal and district courts vis-à-vis the Nuclear Regulatory Commission. The fact that it is the utility company responsible for the Three Mile Island accident petitioning herein, and not the Agency charged with regulating the utility, is a significant

commentary on whether the opinion unduly disrupts the normal pattern of administrative regulation. Evidently, the NRC was not concerned enough about the "emasculations," "floods," and "erosions" lamented by the utility company to join in its petition.

Petitioners claim that the Third Circuit's opinion violates the judge-made rule of exhaustion of administrative remedies (this is not a case involving a statutory exhaustion requirement) and that the Court of Appeals has sidestepped the exclusive review provision of the Atomic Energy Act, 42 U.S.C. §2239(b), and the Administrative Orders Review Act, 28 U.S.C. §2342(4), for certain "final orders."

Petitioners conveniently overlook the fact that the Third Circuit upheld the exclusive review provision for claims arising under the Atomic Energy Act where it

applied and that the issues at stake here involve claims of activities illegal under the National Environmental Policy Act, the Clean Water Act, and the Constitution.

Petitioners' analysis of these issues lumps all types of cases, fact situations, and orders together and attempts to invoke the mantle of nuclear power [Petitioners' Brief for Certiorari (hereinafter Pet.Br.) at 8] as a way to prevent the arsenal of remedies available to a district judge from being brought to bear upon such activities.

B. No Court Has Held Contrary to the Ruling Below

Petitioners' brief asserts that the Third Circuit's opinion is contrary to Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 526-27(1978), Grand Canyon

Dorries, Inc. v. Walker, 500 F.2d 588 (10th Cir. 1974), and City of Rochester v. Bond, 603 F.2d 927 (D.C. Cir. 1979). Pet. Br. at 10.

Nothing in Vermont Yankee stands for the proposition that "review of the adequacy of NRC compliance with NEPA in licensing actions lies solely in the courts of appeals pursuant to 42 U.S.C. §2239(b) and 28 U.S.C. §2342." Pet. Br. at 10. Indeed there was no discussion in the opinion of that issue. Vermont Yankee was fundamentally concerned with courts imposing procedures on rulemaking proceedings.

Furthermore, the two cases are poles apart factually. This case involved protecting citizens from a threatened discharge of radioactive waste into their drinking water supply, in the absence of any formal administrative action, licensing proceeding, any other hearing, or

pursuant to an EIS. In contrast, Vermont Yankee involved a remand by the Circuit Court after a licensing process that had been going on since 1969 and "an incredibly extensive review" that had involved over two weeks of hearings and books of transcripts. Vermont Yankee, 435 U.S. at 557.

Because Vermont Yankee was not concerned with the role of district courts in reviewing NEPA violations, it cannot possibly be at odds with the Third Circuit opinion.

The suggested conflict with opinions by the circuit courts is no more real. Grand Canyon Dorries, Inc. v. Walker, 500 F.2d 588, (10th Cir. 1974), involved a rather abstract disagreement over administrative policy regarding the operation of the Glen Canyon Dam, i.e., (1) whether intermittent flows from the dam violated an implied contract

with the tour operators; and (2) whether the National Environmental Policy Act, 42 U.S.C.§4321 et seq., required preparation of an EIS for continued operation of the dam.

Glen Canyon Dam had been constructed prior to the passage of NEPA, and therefore the federal agencies which had been sued had not even considered NEPA in their decision-making. As Judge Seth stated, he and the plaintiffs in the case could only speculate on the position the Department of Interior might take on the requirement for an EIS. Thus he characterized the problem before him as "one of ripeness." Id. at 590.

In the present case, there was no need to speculate as to the NRC's position on the requirements of NEPA. That statute, passed ten years prior to the accident at TMI, was totally ignored by the NRC until

its announcement of May 25, 1979. Even then it stated its intention to do a series of environmental assessments on three aspects of the clean-up, rather than a comprehensive EIS. Not until four days before oral argument in the Third Circuit and after commitment to significant clean-up activities did the agency commit itself to doing a full EIS to evaluate those very commitments. See Opinion below, Pet.App. at 18a.

In City of Rochester v. Bond, 603 F.2d 927 (D.C. Cir. 1979), the Court was again faced with a facility (a 600-foot radio antenna tower) that was already built. A formal administrative hearing and two informal public hearings provided an adequate administrative record for the Appeals Court to review. In rejecting the City of Rochester's belated efforts to reopen a Federal Aviation Administration and

Federal Communications Commission "no hazard" determination, the Court relied primarily on the fact that the determination was a reviewable order. As Judge Wilkey points out: "[I]f ... there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies. City of Rochester, 603 F.2d at 931 (emphasis added).

The case at bar differs from City of Rochester in both respects. First, there was no administrative record for the Appeals Court to review in this case. Secondly, as the NRC itself admits, its October 1979 order to Metropolitan Edison regarding operation of the decontamination equipment was not a final order covered by §189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a). Pet.App., 55a-56a. It was

therefore not covered by the exclusive review provision of the Act, 42 U.S.C. §2239(b).* It is within Congress' purview to create an exclusive statutory review provision for certain types of administrative orders and not for others. This is precisely what Congress has done in the Atomic Energy Act. Unlike the Court in City of Rochester, Petitioners would have this Court sweep into the exclusive review provision every NRC action, inaction, and order, no matter under which section of the Act it issues.

The District of Columbia Circuit's decision in Natural Resources Defense Council v. Nuclear Regulatory Commission, 606 F.2d 1261 (D.C. Cir. 1979) was

*Presumably, therefore, the oral approval given in April of 1979 to construct EPICOR-II was also not a reviewable order under §189(a).

similarly premised on the fact that there was a "final order" with an administrative record ripe for review. "[T]here is no dispute that NRC's decision constitutes a 'final order' under 28 U.S.C. §2342 and 42 U.S.C.§2239." Id. at 1265. In the Three Mile Island case, the respondents and NRC both dispute the existence of a final order under 42 U.S.C. §2239.

There is no conflict between a rule which states that NEPA and other issues may be raised in agency proceedings and, if made part of a statutorily reviewable order, must be raised in the appeals court, with the ruling below that affords Respondents the opportunity to correct illegal agency action in district court prior to the existence of a statutorily reviewable order and record and where it is unlikely that such a reviewable order

will be forthcoming. Opinion below, Pet. App., 14a-20a; See, Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).

C. Petitioners Seek to Argue Factual Matters Contrary to the Complaint

Courts have traditionally recognized exceptions to the judicially-created exhaustion doctrine. Exceptions include circumstances where "the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights, ... when resort to administrative procedures is 'clearly shown to be inadequate to prevent irreparable injury,' ... or when exhaustion is futile." Pet. App., p. 26a-27a. (Citations omitted.)

In this case, the factual conditions necessary for all three exceptions were

pleaded in the Complaint. Where, as here, the District Court dismissed the action without a hearing, the reviewing court must take the allegations in Respondents' Complaint as true for the purposes of appeal. Frank Mashuda v. Allegheny Co., 256 F.2d 241 (3d Cir. 1958), aff'd, 360 U.S. 185 (1959), reh. denied, 361 U.S. 855 (1959).

Respondents' Complaint asserts clear and unambiguous violations of statutes and the Constitution (Complaint, ¶'s 79, 99, 112, 113), that resort to the NRC procedure would have been futile (Complaint, ¶4), and that Respondents were imminently threatened with irreparable injury (Complaint, ¶'s 22, 84, 106). Contrary assertions in Petitioners' brief are appropriate for hearing by the District Court,

and not for argument in this Court.*

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Third Circuit is not in conflict with any decision of this Court nor is it in

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*The Clean Water Act count provides a blatant example of Petitioners' attempt to have the benefit of their own version of the facts. After first suggesting that it should not be the Court but the NRC which must necessarily ascertain whether the water to be disposed of after processing will in fact be "high-level radioactive waste within the meaning of Section 301(f) of the Clean Water Act..." (Pet. Br. at 12), they then assert on page 13:

> Since, as indicated above, the wastewater to be discharged here is of a type subject to the exclusive regulatory jurisdiction of the NRC under the Atomic Energy Act, it is, as this Court stated in Train, 'beyond the reach' of the Clean Water Act....

conflict with the other Circuits and, therefore, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 11th day of October, 1980, three copies of the foregoing Brief in Opposition of Susquehanna Valley Alliance, et al., were served by deposit in the United States mail, first class, postage prepaid, upon the following:

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